

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1329

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, *Appellee,*
v.
GORMANSTON WISHART, *Appellant.*

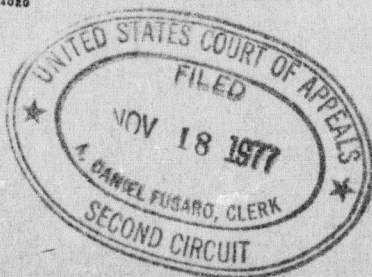
APPEAL FROM THE JUDGMENT OF CONVICTION IN THE UNITED
STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF
NEW YORK, HONORABLE JOHN T. ELEVIN,
DISTRICT JUDGE.

BRIEF FOR THE APPELLEE

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IN THE
United States Court of Appeals

For the Second Circuit

Docket No. 77-1329

UNITED STATES OF AMERICA,

Appellee,

v.

GORMANSTON WISHART,

Appellant.

Appeal From the Judgment of Conviction in the United
States District Court for the Western District of New
York, Honorable John T. Elfvin, District Judge.

BRIEF FOR THE APPELLEE

Preliminary Statement

Gormanston Wishart was tried on a four count indictment charging him with conspiracy to bring an alien into the United States unlawfully (count I), bringing an alien into the United States unlawfully (count II), encouraging the unlawful entry of an alien (count III), and assaulting an Immigration officer (count IV). The Honorable John T. Elfvin dismissed count III at the close of the Government's case. The jury found Wishart guilty of conspiracy and bringing an alien into the United

States unlawfully, and acquitted him of the assault charge. He was sentenced to fifteen months imprisonment.

The defendant now appeals, alleging that the trial judge erred in refusing to give a lesser-included offense instruction which would have permitted the jury to find the defendant guilty of conspiracy to obtain the entry of an alien into the United States by means of false or misleading representations.

Statutes Involved

Count I charged the defendant with conspiracy in violation of Title 18, United States Code, Section 371, which provides as follows:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

The object of the conspiracy was to violate Title 8, United States Code, Section 1324 which provides in pertinent part as follows:

(a) Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who—

(1) brings into or lands in the United States, by any means of transportation or otherwise, or attempts, by himself or through another, to bring into or land in the United States, by any means of transportation or otherwise; . . .

any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to en-

ter or reside within the United States under the terms of this chapter or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding \$2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs . . .

The defendant claims that the Court should have given a lesser-included offense charge based upon Title 8, United States Code, Section 1325 which provides as follows:

Any alien who (1) enters the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offenses, be guilty of a misdemeanor and upon conviction thereof be punished by imprisonment for not more than six months, or by a fine of not more than \$500, or by both, and for a subsequent commission of any such offenses shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment for not more than two years, or by a fine of not more than \$1,000, or both.

Statement of the Case

The principal evidence at trial was the testimony of Harri Prashad, the alien who entered the United States unlawfully, and Lloyd Miller, who was originally charged with the same offenses as Wishart.

Prashad testified that he was a citizen of Guyana who had been granted landed immigrant status in Canada in 1975. However, when his sponsorship was withdrawn and he was forced to leave Canada, he approached a friend, Gormanston

Wishart, on January 7, 1977, and asked him for assistance in entering the United States (Trial transcript 25-26). Wishart told Prashad he could make arrangements to get Prashad into the United States by using a friend's Canadian immigration documents, although it would cost Prashad some money for the documents. Wishart called Prashad later that day and told him he would come by shortly and drive Prashad to the United States. Wishart arrived at Prashad's apartment shortly thereafter. Prashad put three suitcases in the trunk of Wishart's automobile and the two proceeded to Lloyd Miller's apartment (Tr. 28-29). Wishart then drove both Prashad and Miller to the border where they stopped at a bar and had some drinks. Wishart rented a motel room and told Prashad that Miller would remain at the room with Prashad's luggage while Wishart drove Prashad across the border to Buffalo. Wishart said he would return for Miller and the luggage after Prashad had been left in the United States (Tr. 30). At the motel room, Miller gave Wishart his Canadian landed immigrant papers which was sufficient authority for Miller to enter the United States lawfully (Tr. 30-31).

According to Prashad, Wishart then drove him across the Peace Bridge to a bus terminal in Buffalo. Prashad gave Wishart \$170 as payment for Wishart's and Miller's assistance (Tr. 35). A short time after Wishart's departure from the bus terminal, Prashad was apprehended by Border Patrol agents (Tr. 36).

Miller corroborated Prashad's version of the events of January 7 and 8, 1977. He testified that he agreed to go with his friend Wishart to Buffalo on January 7th (Tr. 204). Miller accompanied Wishart and Prashad to a Fort Erie bar. Wishart then rented a motel room where he deposited Prashad's luggage (Tr. 207). In the room, Wishart asked Miller if

Frashad could use Miller's immigration document to enter the United States. Miller agreed and gave Wishart the document. Prashad and Miller left, and Miller went to sleep (Tr. 209-210).

A few hours later, Wishart returned to the motel alone to pick up Miller and Prashad's suitcases (Tr. 210-211). Wishart then drove across the Peace Bridge again but was refused entry into the United States when an immigration inspector discovered Prashad's suitcases which contained women's and children's clothing (Tr. 211 and 280). The Immigration inspector stamped "refused entry" on Wishart's passport (Tr. 211-212 and 284-285).

Wishart and Miller returned to Canada and headed towards Niagara Falls, Ontario to attempt another entry into the United States (Tr. 212-213). En route, Wishart tore out the page of his passport on which had been stamped "refused entry" (Tr. 212-213). The two then successfully entered the United States at Niagara Falls and went to the bus terminal in Buffalo to meet Prashad who, by this time, had been arrested by Border Patrol agents (Tr. 214-215). Wishart and Miller carried Prashad's luggage into the terminal where they were approached by two Border Patrol agents who eventually placed them under arrest. A scuffle ensued when one of the agents attempted to take Wishart into custody.

An employee of the Fort Villa Motel in Fort Erie, Ontario, testified that Wishart rented a motel room during the early morning hours of January 8, 1977 (Tr. 201; Government Exhibit 10). An immigration inspector testified that he refused to permit Wishart and Miller to enter the United States at the Peace Bridge that morning because they had no reasonable explanation for the presence of three large suitcases containing women's and children's clothing in Wishart's trunk.

The defendant did not testify and no evidence was presented on his behalf.

POINT I

The defendant was not entitled to a lesser-included offense instruction.

Rule 31(c) of the Federal Rules of Criminal Procedure provides that a defendant "may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense".

To determine whether a defendant is entitled to a lesser-included offense instruction, the trial Court must first decide if some of the elements of the greater offense constitute the lesser offense since "the lesser offense must be included within but not, on the facts of the case, be completely encompassed by the greater". *Sansone v. United States*, 380 U.S. 343, 350 (1965). Next, the Court should examine the evidence to determine whether the factual issues to be resolved by the jury are the same for both the greater and lesser offenses. If there is evidence of a disputed factual element which would enable the jury rationally to find that the prosecution proved all of the elements of the lesser offense but not all of the elements of the greater offense, the defendant is entitled to the lesser-included offense charge.

The Government submits that the defendant was not entitled to a lesser-included offense charge since (1) a conspiracy to obtain the entry of an alien into the United States by false representation, in violation of Section 1325, is not established by proof of some of the elements of a conspiracy to bring the alien unlawfully into the United States, in

violation of Section 1324; (2) there are no genuinely disputed factual elements in this case; and (3) the jury could not rationally acquit the defendant of the felony conspiracy (Section 1324) and convict him of the misdemeanor conspiracy (Section 1325).¹

A. The elements of Section 1325 are not necessarily included within Section 1324.

The trial Court instructed the jury that the Government had to prove each of the following elements with respect to the offense of bringing an alien unlawfully into the United States (Section 1324): (1) Wishart transported an alien into the United States; (2) the alien, Harri Prashad, was not lawfully entitled to enter or reside within the United States; (3) Wishart knew that Prashad was an alien not entitled to enter or reside in the United States; and (4) Wishart acted willfully (Appendix 398-399). The defendant did not object to this portion of the charge.

The elements required to prove a violation of Section 1325(3), obtaining entry of an alien by means of false representations, are not the same. To establish such a violation, the Government would have to prove (1) an alien obtained entry into the United States; and (2) the entry was obtained by means of some willfully false or misleading representations.

Thus, it is apparent that persons could conspire to bring an alien into the United States unlawfully in violation of Section 1324 without doing the acts which constitute the offense of

¹ The defendant claims that he was entitled to a lesser-included offense instruction only with respect to the conspiracy charge, count I. He makes no such claim regarding count II, the substantive offense of bringing an alien into the United States unlawfully.

obtaining the entry of an alien by false representations in violation of Section 1325. For instance, a person who agrees to transport into the United States an alien whom he knows is not entitled to enter the United States lawfully may have no knowledge of and take no part in any plan to present phony documents or make false representations to immigration authorities regarding the citizenship of the alien. In that case, the person would have committed the greater offense (Section 1324) but not the lesser offense (Section 1325). If this result is possible, Section 1325 is not a lesser-included offense of Section 1324.²

If an offense is a lesser-included offense, it must be impossible to commit the greater offense without first having committed the lesser offense. *Olais-Castro v. United States*, 416 F.2d 1155, 1157 (9th Cir. 1969). A lesser-included offense "is of a kind in which one cannot commit the greater offense without committing the lesser offense." *United States v. Harary*, 475 F.2d 471, 474 n.6 (2nd Cir. 1972).

For an example of "more subtle kinds of smuggling" which would violate Section 1324 but not Section 1325, see *United States v. Bunker*, 532 F.2d 1262, 1266 (9th Cir. 1976).

B. There were no disputed factual elements at trial to warrant a lesser-included offense instruction.

Even assuming *arguendo* that a Section 1325 conspiracy is a necessarily included offense of a Section 1324 conspiracy, there was no genuine disputed factual element at the trial which could lead the jury rationally to convict on a misdemeanor conspiracy and acquit on the felony conspiracy.

² In the only reported case where a defendant claimed that the trial Court erred in not instructing the jury that Section 1325 was a lesser-included offense to Section 1324, the appellate Court characterized the argument as "unusual at best" *United States v. Madden*, 525 F.2d 972, 973 (5th Cir. 1976).

The phrase "disputed factual element" was first used by the Supreme Court in connection with a lesser-included offense instruction in *Sansone v. United States*, 380 U.S. 343, 350 (1965). Interpreting *Sansone*, most Courts have emphasized that there must be a genuine dispute or conflict in the evidence before the defendant is entitled to a lesser-included offense instruction.

For instance, in *Driscoll v. United States*, 356 F.2d 324 at 327 (1st Cir. 1966), vacated on other grounds, 390 U.S. 202, the First Circuit has stated as follows:

We take *Sansone* to mean that when the government has made out a compelling case, uncontroverted on the evidence, on an element required for the charged offense but not for the lesser-included offense, there is a duty on defendant to come forward with some evidence on that issue if he wishes to have the benefit of a lesser-included offense charge. To put it another way, while a judge cannot prevent a jury from rejecting the prosecution's entire case, he is not obligated, under these circumstances, to assist a jury in coming to an irrational conclusion of partial acceptance and partial rejection of the prosecution's case by giving a lesser-included offense instruction.

Other Courts have held that an instruction on lesser-included offenses should not be given unless there is evidence to support it. *United States v. Marcey*, 440 F2d 281, 285 (D.C. Cir. 1971) (instruction not proper where evidence is uncontradicted). The "disputed factual element" normally arises from sharply conflicting testimony. *United States v. Sinclair*, 444 F2d 888, 889 (D.C. Cir. 1971). The factual issue must be "truly disputed." *United States v. Rogers*, 504 F2d 1079, 1084 (5th Cir. 1974) (where the defendant is found with 427 pounds of marihuana in his possession and is charged with intent to distribute the marihuana, "absent some evidence to counter the strong inference of intent to distribute, the issue is not ele-

vated to a truly disputed one" to entitle him to the lesser-included offense instruction).

This Court has also required that a genuine factual dispute exist before a defendant is entitled to a lesser-included offense charge. *United States v. Markis*, 352 F2d 860, 866-867 (2nd Cir. 1965). Moreover, there must be some evidence in the record which would warrant the instruction. *United States v. Marin*, 513 F2d 974, 977 (2nd Cir. 1975); and *United States v. Carroll*, 510 F2d 507, 509 (2nd Cir. 1975).

There is no disputed factual element in this case which would warrant a lesser-included offense instruction. Prashad and Miller both testified that it was Wishart who drove them to the border, rented a motel room in which to store Prashad's luggage, gave Prashad the immigration papers belonging to Miller, and left the motel in the early morning hours with Prashad. Prashad testified that it was Wishart who drove him across the border, demanded money for bringing him into the United States, and left him at the bus terminal. Miller testified that Wishart returned to the motel without Prashad, put Prashad's luggage into his automobile, attempted entry into the United States again without success, tore the marked page out of his passport to avoid suspicion at another border crossing, entered the United States once again, and attempted to deliver the luggage to Prashad.

All of this testimony was uncontradicted. Indeed, the motel employee and the immigration inspector who refused Wishart entry into the United States corroborated the testimony of Prashad and Miller. Furthermore, the physical appearance of Wishart's passport, which was Government Exhibit 4, confirmed Miller's testimony that a page had been torn out of the passport.

Although the defendant now suggests that Prashad may have walked, hitchhiked or taken a bus across the border, this

argument is sheer speculation and finds no support in the record. The defendant did not testify and no evidence was presented on his behalf. If Prashad did indeed take a bus across the border, the defendant could have offered evidence regarding the availability of bus transportation between Fort Erie and Buffalo during the hours in question. In Judge Friendly's words in *United States v. Markis*, 352 F2d 860 at 867 (2nd Cir. 1965) "the mere fact that the jury was still free to disbelieve this portion of the (witness's) testimony does not elevate the issue to a truly 'disputed' one; in the language of the Model Penal Code Section 1.07(5) (1962), it does not provide 'a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.' "

C. The jury could not rationally acquit in the greater offense and convict on the lesser offense.

In addition to the requirement of a disputed factual element, there must also be a rational basis for the jury to acquit on the greater offense and convict on the lesser offense. As the First Circuit said in *Driscoll v. United States*, 356 F2d 324, 327 (1st Cir. 1966), "Two prerequisites seem vital: That there be no factual dispute and that a finding contrary to the only evidence on the issue would be irrational."

In *United States v. Harary*, 457 F2d 471 at 477 (2nd Cir. 1972), Judge Kaufman described the test in the following manner:

Thus, if the court can conclude on the basis of the evidence presented that no reasonable man, weighing solely the evidence in light of the applicable law, could find the defendant guilty of the lesser offense and at the same time not guilty of the greater offense, no disputed factual element could be present which would compel the court to give the lesser-included offense instruction.

Upon the evidence before it, the jury could not rationally acquit the defendant of the felony conspiracy and convict him of a misdemeanor conspiracy since the evidence was essentially the same for both. If the jury believed Prashad and Miller, they would have to convict Wishart of the two felonies, conspiracy and bringing an alien unlawfully into the United States. If the jury did not believe Prashad and Miller, they would have to acquit him of both the greater and lesser offenses.

The defendant suggests that the jury could choose to believe only so much of Prashad's testimony as was corroborated by other evidence. Since the only direct evidence that Wishart actually transported Prashad across the border was Prashad's testimony³, the defendant argues that the jury could rationally acquit him of the two felonies and then convict him of a misdemeanor conspiracy to obtain Prashad's entry by means of false representations.

Even if one accepts this hypothesis, the jury still could not rationally convict on the lesser offense and acquit on the greater offenses because the remaining evidence plainly established Wishart's guilt of conspiracy to bring Prashad into the United States and, at the very least, aiding and abetting in Prashad's unlawful entry. To establish Wishart's guilt on the conspiracy charge, the Government did not have to prove that Wishart brought Prashad into the United States or even that Prashad did in fact enter the United States. It was sufficient if the evidence established an unlawful agreement between

³ There was circumstantial evidence to corroborate Prashad's testimony that Wishart drove him across the border: Miller testified that Wishart left the motel in his automobile with Prashad as his passenger, but returned three hours later alone. Border Patrol agents found Prashad at the bus terminal in Buffalo. From this evidence alone, the jury could infer that Wishart brought Prashad into the country.

Wishart and Miller or Prashad to effect Prashad's unlawful entry into the United States, together with the commission of one of the six overt acts alleged in the indictment. Only overt act number five alleges that Wishart drove Prashad across the border (App. 6-7). Therefore, any jury verdict rejecting the Government's proof on the greater offense but accepting the same proof to convict on a lesser offense would be irrational.

With regard to count II of the indictment which charged that Wishart unlawfully brought Prashad into the United States, the Government need not prove that Wishart actually transported Prashad across the border. Section 1324 makes it an offense for any person to bring into or land in the United States "by any means of transportation or otherwise, or attempts, by himself or through another, to bring into or land in the United States, by any means of transportation or otherwise" any alien not lawfully entitled to enter the United States. Thus, the statute proscribes attempts as well as actual entries into the United States. Also, the language is sufficiently broad to cover situations where the smuggler does not personally bring the alien into the United States. The language has been interpreted to include within its reach a defendant who masterminds a smuggling operation but does not actually provide the alien's transportation into the United States. *Caranza-Chaidez v. United States*, 414 F2d 503 (9th Cir. 1969); and *United States v. Washington*, 471 F2d 402, 405 (5th Cir. 1973).

It is clear from the record below that the defendant's main objective was to convince the jury that he should have been treated the same as Miller, that is, he should have the opportunity to be convicted of a misdemeanor. However, with that option being unavailable to the jury, the defendant argued that "fairness" required the jury to acquit him al-

together. In his summation to the jury, the defendant's counsel said the following:

I suspect if in the abstract you had the three individuals (Wishart, Miller and Prashad) before you, your determination would be that they should all be treated the same, and if that were the consideration before you, then maybe there would be no objection, but what has been done to this point, and in connection with what is it that you are being asked to do, the government has made the decision that Mr. Prashad is a victim, and the government has made the decision that Mr. Miller should be given the opportunity to testify and to possibly be sentenced to time served, to plead guilty to the charge which exposes him to much less liability. (Tr. 382-383)

I think the problem in here is is there some way that justice can be done to the extent that Mr. Wishart is treated the same, treated fairly? It is not a question of what you should do in this case. (Tr. 383-384)

Finally, defendant's counsel made very plain what he wanted the jury to do in light of Judge Elfvin's ruling on the lesser-included offense instruction:

. . . the fair result, the result which is available to you by your verdict is to acquit Mr. Wishart of the conspiracy charge and the charge of unlawfully bringing Mr. Prashad into the country, and that is available to you, and it is a fair result, and that goes back to point out that the government cannot entirely remove from you the choices and the opportunity to be fair. Unfortunately, and through—well, as a result of things which are beyond our concern at this point, you are not provided, through no fault of myself or the defendant, you are not provided with the opportunity to find the defendant guilty of the same thing that Mr. Miller pled guilty to. That simply isn't something which you are going to have a chance to do. Having that chance taken away from you—" (Tr. 387).

At this point, an objection was made to the obvious plea for sympathy.

A defendant is not entitled to a lesser-included offense instruction simply because he believes he should be treated as co-defendants have been treated. As Judge Leventhal said in *Kelly v. United States*, 370 F2d 227, 229 (D.C. Cir. 1966),

An element of the mercy-dispensing power is doubtless inherent in the jury system, and may well be a reason why a defendant seeks a lesser included offense instruction, but it is not by itself a permissible basis to justify such an instruction.

On the facts of this case, the trial court properly refused the requested instruction.

Conclusion.

For the reasons stated above, it is respectfully submitted that the judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

RE: USA

vs

Gormanston Wishart

State of New York)
County of Genesee) ss.:
City of Batavia)

No. 77-1329

Leslie R. Johnson

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502 U.S. Courthouse, Buffalo, New York 14202

Leslie R. Johnson

Sworn to before me this

16th day of November, 1977

Patricia A. Lacey

PATRICIA A. LACEY
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 1979

